IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CRIMINAL JURISDICTION

CRIMINAL APPEAL NO.795 OF 2002

The State of Maharashtra.... Appellant

versus

Bharat Laxman Mormare .. Respondent

Mr.K.V.Saste,APP for Appellant

Mr.V.S.Tapkir,Advocate for Respondent

CORAM : D.G.DESHPANDE AND SMT.ROSHAN DALVI, JJ

DATE : 8th November, 2006

ORAL ORDER (Per D.G.Deshpande, J)

1. Heard.

2. This appeal is filed by the State for enhancement of the sentence of the accused-respondent Bharat Laxman Mormare.

3. The accused-respondent was convicted by the trial Court i.e. VIth Additional Sessions Judge, Pune on 11th April, 2001 for an offence under section 376 IPC. He was sentenced to suffer R.I.for 5 years and pay a fine of Rs.500/- in default of payment of fine to suffer R.I. for three months. It is against this judgment that the present appeal is filed.

4. The only submission that was made by the learned A.P.P.was that under the proviso to section 376 (1) IPC minimum sentence that has been awarded is 7 years and if the Judge is inclined to award a sentence lesser than the minimum, then he has to give adequate and special reasons in the judgment.

5. The learned A.P.P. in this background drew our attention to para 46 of the judgment where the trial Court has stated thus :

> " The accused prayed for leniency. His age is 23 years. There is no past criminal record against him. The circumstances show that there was tacit consent of the prosecutrix. Having regard to all these circumstances, I think it proper to award lesser punishment than minimum, provided under section 376 IPC. The girl though minor, is not so tender aged. This is a mitigating circumstance."

6. In our opinion, this observation and the reasons given by the trial Court are totally wrong. Admittedly, the girl upon whom rape was committed was about 13 years of age as per the prosecution. The trial Court was wrong in holding or observing or noting that there has been tacit consent of the prosecutrix. When the girl is minor, there is no question of consent and it cannot be inferred in any manner whatsoever. Secondly, further observation that the age of the girl though minor is not so tender is also wrong. Section 376 IPC does not make any difference in this regard.

7. Section 376 (1) IPC is as under :

> " Punishment for rape: (1) Whoever, except in the cases provided for by sub-section (2) commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both.
>
> Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years. "

8. It will be clear from the aforesaid provision

that it is only under exceptional cases or circumstances, for which the Judge has to give adequate and special reasons, that the sentence lesser than the minimum can be imposed. The reasons given by the trial Court are totally perverse and therefore, this appeal is required to be allowed. The minimum sentence is 7 years. The trial Court has awarded a sentence of 5 years.

Therefore, the following order :

" This appeal is allowed. The judgment of the trial Court is modified as under :

The accused to be sentenced to suffer R.I. for 7 years and fine of Rs.5000/- in default to suffer R.I. for one year. If the accused pays the fine, Rs.4000/- out of that should be paid to the victim.

If the accused has been released from jail after under-going the sentence awarded by the trial Judge, the Sessions Judge, Pune will again take him back in custody so that he undergoes 2 years R.I. and payment of fine and the sentence in default as stated above. "

The appeal is disposed of accordingly.

9. The order be communicated to the Sessions Judge, Pune and to the jail authorities.

Certified copy expedited.

(Smt R.S.Dalvi,J) **(D.G.Deshpande, J)**